United Nations AT/DEC/1206

Administrative Tribunal

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ADMINISTRATIVE TRIBUNAL

Judgement No. 1206

Case No. 1292: SCOTT Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Kevin Haugh, Vice-President, presiding; Mr. Omer Yousif Bireedo; Mr. Spyridon Flogaitis,

Whereas at the request of Kenneth Scott, a staff member of the United Nations, the President of the Tribunal, with the agreement of the Respondent, granted an extension of the time limit for filing an application with the Tribunal until 31 January 2003 and once thereafter until 31 March 2003;

Whereas, on 31 March 2003, the Applicant filed an Application requesting the Tribunal, inter alia:

> "11. On the merits, ... ***to find***:
>
> a. that the Respondent failed to follow and apply correctly the 'Standard of Recruitment and Grading for the Professional and Higher Categories' [(the Grading Standard)] dated 21 November 1994, in placing the Applicant at step [VI];
>
> b. that in placing the Applicant at step [VI], the Respondent applied an alleged 'rule' that the maximum step that could be assigned to the Applicant was step [VI];
>
> c. that the Respondent falsely and by false pretence claimed to apply a 'rule' that did not in fact exist and which was contrary to written [United Nations] policy;
>
> d. that the Respondent abused his discretion and acted arbitrarily and unjustly toward the Applicant, and contrary to good administrative practice, and denied the Applicant due process; and

e. that the Applicant was injured and denied due process by unreasonable delay in the ... proceedings ...

...

12. Wherefore, ... ***to order***:

a. that the Applicant's step be amended to step [X], retroactive to 1 January 1998 ... and that he be compensated accordingly;

b. that the Applicant be awarded compensation for unreasonable delay in the ... proceedings ..."

Whereas at the request of the Respondent, the President of the Tribunal granted an extension of the time limit for filing a Respondent's answer until 15 August 2003 and periodically thereafter until 30 November;

Whereas the Respondent filed his Answer on 24 November 2003;

Whereas the Applicant filed Written Observations on 10 February 2004;

Whereas the Applicant filed a "Supplemental Submission" on 14 October 2004;

Whereas, on 26 October 2004, the Tribunal asked the Respondent whether he would be willing to undertake "an independent re-evaluation as to the appropriate entry level" for the Applicant within a specified period and, on 1 November, the Respondent indicated his willingness to undertake such a review;

Whereas, on 4 November 2004, the Applicant submitted comments with regard to the "independent re-evaluation";

Whereas, on 19 November 2004, the Respondent submitted the results of the "independent re-evaluation";

Whereas the statement of facts, including the employment record, contained in the report of the Joint Appeals Board (JAB) reads, in part, as follows:

"***Employment History***

... [The Applicant] was recruited effective 1 January 1998, as a Legal Officer with the International Criminal Tribunal for the Former Yugoslavia (ICTY) in the Hague, at the P-4 level, step VI. His initial fixed-term appointment [was subsequently extended].

Summary of the facts

[According to the Applicant, upon recruitment he was advised by the Human Resources Section that he had been given "the highest possible or maximum step - step [VI]".]

... In memoranda of 10 November and 14 December 1998 addressed to the ICTY Administration, [the Applicant] requested that he be granted additional steps at the P-4 level. [On 11 November 1998, the Chief, Human

Resources Section, ICTY, responded to the first of these memoranda, indicating that the Applicant had "been granted the maximum steps allowable at that level as set out in the [Grading Standard]. On 29 January 1999, the Deputy Prosecutor, ICTY, asked that 'urgent consideration' be given to the Applicant's request as he 'seem[ed] to make a good case for an interpretation of the appropriate rules which would justify his classification' at the P-4, step X, level.] [The] Chief, Human Resources Section, ICTY, [again] replied [to the Applicant] on 4 February 1999, stating, *inter alia*,

> 'At the time of recruitment staff may receive a higher step than step [I], which is the customary level for the majority of newly recruited staff, based on the personal qualifications of the staff member. Step [VI] is considered the maximum step for new recruits. The appropriate step is determined by the Human Resources Section based on prevailing practice and guidelines applied throughout the United Nations common system. Step [VI], as was granted in your case, already reflects that your accomplishments and experience were duly considered.'

[The Applicant's] request for a higher step was, therefore, refused.

... On 31 March 1999, [the Applicant] addressed a letter to the Secretary-General requesting an administrative review of this decision and putting forth his case for justifying the granting of step X.

... In the absence of a substantive reply to his letter, [on 7 July 1999, the Applicant lodged an appeal with the JAB in New York]."

The JAB adopted its report on 17 January 2002. Its considerations, decision and recommendation read, in part, as follows:

"***Considerations***

12. The Panel was aware that the matter under appeal lies within the discretionary authority of the Secretary-General and that, in any event, the Panel itself was not qualified to make a determination - or a recommendation - concerning the appropriate step for Appellant on recruitment. ...

13. The Panel recalled that staff rule 111.2 makes provisions for review of an administrative decision, upon receipt of a request from the staff member concerned. The Panel recognized the potential value to the Organization of that procedure: if the Appellant were satisfied with the results of that review, as reported to him, the Organization would be saved the expense of an appeal and, perhaps, of further proceedings. The Panel noted that in this case two individuals were granted higher steps than step [VI], indicating that the grading standards may not have been uniformly applied. The Panel also noted that the incorporation of the administrative review in the Staff Rule constitutes an implicit recognition that officials may, on occasion, err in the exercise of the discretionary authority delegated to them.

14. The Panel wishes to make it clear that it has come to no conclusion as to the correctness of [the] decision [of the Chief, Human Resources Section, ICTY]. What concerned the Panel was the tacit decision by the Administration not to subject that decision to an administrative review ...

Decision and Recommendation

15. The Panel decided unanimously to recommend to the Secretary-General that the decision to place Appellant on step VI of grade P-4 be reviewed at a sufficiently senior level to assure him that his due process rights have been respected.

16. While the Panel has no further recommendation to make with respect to this appeal, it would urge the Administration, for the reasons touched on in paragraph 13 above, to resort more frequently to the administrative review procedure."

On 16 August 2002, the Under-Secretary-General for Management transmitted a copy of the JAB report to the Applicant and informed him that the Secretary-General accepted the Board's conclusion and its unanimous recommendation, and had "decided that the Registrar of ... ICTY, who was not involved in the initial decision, [would] review [the Applicant's entry level] to ascertain its correctness".

By memorandum dated 13 September 2002, the Registrar of ICTY indicated that he had reviewed the Applicant's recruitment level pursuant to the recommendation of the JAB and had determined that the step at which the Applicant was recruited "was in full compliance" with the Grading Standard. He thus concurred with the original decision to place the Applicant at the P-4, step VI level. Thereafter, on 23 January 2003, the Registrar again wrote to the Applicant, referring to a recent meeting between them, and stating, inter alia:

> "The fact that, in the past, there were two persons to whom you referred who were granted higher initial steps than you were, does not warrant your conclusion that the Organization did not comply with its own procedures in your particular case".

On 31 March 2003, the Applicant filed the above-referenced Application with the Tribunal.

Whereas the Applicant's principal contentions are:

1. The quantity and quality of the Applicant's training, experience and qualifications are such that he should have been placed at step X at the time of his initial employment.

2. In improperly, and inconsistently, implementing the Grading Standard, ICTY acted arbitrarily towards the Applicant, violating his rights of due process.

3. The review performed by ICTY pursuant to the Secretary-General's decision of 16 August 2002 was neither meaningful nor substantive, but a *pro forma* exercise.

Whereas the Respondent's principal contentions are:

1. The decision to place the Applicant at the step VI level was based on established policy applied throughout the entire United Nations system.

2. The Applicant's request for correction of entry level was duly considered in the course of the September 2002 review.

3. The Applicant has not substantiated his complaint that he was treated unjustly nor has he demonstrated that he was injured by the alleged administrative delays.

The Tribunal, having deliberated from 28 October to 24 November 2004, now pronounces the following Judgement:

I. One could readily understand the ire and justifiable sense of grievance of a staff member who could establish that he had been induced into accepting an appointment with ICTY at the P-4, step VI level, by a false misrepresentation that that was the highest level at which he could be recruited, and that the Administration was precluded by rules from taking him on at a higher step but that they would have done so had they not been constrained by the rules in question.

The Applicant's case is somewhat different. He was offered a position as Legal Officer at the P-4, step VI level, which he duly accepted, and commenced duty on 1 January 1998. Post-recruitment, having learned that two of his colleagues had been allocated step X upon recruitment, he sought to have his entry level adjusted. He was repeatedly informed that he had been given the highest possible, or maximum, step available so it is natural that he must have suffered an understandable sense of grievance and a belief that he was being unfairly treated as he knew this could not have been the case.

When he wrote to the Human Resources Section in November and December 1998, the Applicant was seeking a review of his grading and seeking that his step be increased from step VI to step X based on his contention that his pre-recruitment experience as a trial lawyer had not been properly measured or assessed and that, on his interpretation of the Grading Standard, he felt he should have been recruited at the higher step. He did not then make the case that he had received any false or misleading representation which had induced him into taking up his appointment on the terms which had been offered, or that he had been then misled.

II. The Applicant cites examples of what he says were untenable or false reasons advanced on behalf of the Administration in seeking to suggest that he could not have been recruited at a higher step. He cites reasons offered to him well after he had commenced his employment and raised the issue as to how the step allocated to him (step VI) had been arrived at, again not making a case that he had accepted the appointment as a result of having been misled about any rules.

Because of the tight confines of the issues in the case and the relatively narrow issues which the Tribunal should address, it is not really essential for the Tribunal to adjudicate upon the proposition advanced by the Applicant that, upon the proper construction of the Grading Standard, he *might* or *could* have been recruited at the higher step. This is so because the Applicant cannot establish that he had any right to have been recruited at the higher step, or establish any right to have his step adjusted upwards, and that any such *right* has been denied. He essentially brings his case on a claim that the ICTY Administration falsely misrepresented to him that the Grading Standard had placed a ceiling on the step allocated to him; that the Administration knowingly misrepresented the terms of the Grading Standard or, alternatively, that they had misconstrued its terms; that they had failed to apply the proper interpretation of the Grading Standard when they evaluated the step to be awarded; and, that on a proper application of its terms, he should have been allocated a higher step. He claims that step X was the appropriate step at which he should have been recruited and that, as a direct consequence of the Administration's fraud or error, he suffered financial loss.

III. The Tribunal should say that it finds that the wording used by the Administration from time to time in answer to the Applicant's contention that he should have been recruited at step X rather than step VI (had his pre-recruitment experience been properly evaluated) to be misleading and unfortunate. The Applicant was advised variously that he had been granted "the highest possible or maximum step - step [VI]"; that "step [VI] is considered the maximum step for new recruits"; and, that the Administration had granted the Applicant "the maximum steps" within the level. These statements clearly sought to indicate that a Staff Rule had imposed this ceiling which was not the case. The justification or answer offered ought to have been that the step VI level, being the entry level upon which the appointment had been offered and upon which it was accepted, had been fixed by the Administration in the exercise of its discretion in relation to the evaluation of the value of the Applicant's pre-recruitment experience or for such other legitimate reasons as might have been invoked. Under the Grading Standard, it is clear that the work experience of a

candidate is to be considered more favourably if the candidate has enjoyed progressive responsibilities and more diversified experience with the passage of time than would be the case had his experience been of a more static or repetitive nature. It was for the Administration to make a subjective assessment as to the quality and relevance of the Applicant's pre-recruitment experience as, under the terms of the Grading Standard, it was not to be assessed merely on the basis of time served. There are clearly many subjective evaluations to be made by the Administration in its evaluation of an applicant and, indeed, in determining the terms of any appointment which they might choose to offer the candidate selected to fill the post.

The Applicant failed to demonstrate to the JAB that the Administration had breached any of the guidelines set out in the Grading Standard but, because of the panel's concerns in the case, it recommended that the decision to grant the Applicant step VI be reviewed at a sufficiently senior level to assure him that his rights of due process had been respected. It was fully cognizant of the fact that the JAB itself was not qualified to carry out this self-same exercise and that it was not appropriate for it to substitute its own subjective assessment of the Applicant's qualifications for the discretion of those officials ordinarily charged with making such assessments and decisions.

The Secretary-General accepted the JAB's said recommendation and, in due course, a review of the said assessment was conducted by the Registrar of ICTY who had not been concerned with, or involved in, the original exercise whereby the Applicant's recruitment step had been initially evaluated. The Applicant, however, takes exception both to the nature of the review and to the manner in which it was conducted. The Registrar concluded that the initial evaluation of the Applicant's step had been properly carried out and that the evaluation at step VI was appropriate. Whilst the Tribunal does not wish to cast any aspersion on the honesty or integrity of the Registrar, he was, nonetheless, a person who would be viewed as a member of the ICTY Administration. Accordingly, he may have shared what appears to have been the said Administration's erroneous view that the Grading Standard somehow placed a ceiling on the step at which the Applicant could have been recruited, or may have been influenced by the interpretation of the Grading Standard or the perception of appropriate practice as was held by ICTY which is set out and quoted in paragraph III above. Clearly, the Applicant harbours the view that the said review could not be considered as properly independent and he has no confidence in its findings.

Since the express intent of the JAB's recommendation was that a review should take place which would make an objective assessment and, regardless of its

outcome, provide reassurance to the Applicant, and since the Tribunal finds it understandable that he genuinely perceived that the review undertaken was neither objective nor impartial, the Tribunal asked the Respondent whether he was willing to conduct a fully independent review of the step-in-grade to which the Applicant was entitled upon his recruitment. This review was conducted by two Senior Human Resources Officers in the Operational Services Division of the Office of Human Resources Management (OHRM) at Headquarters, a unit untainted by any of the above-referenced concerns. On 19 November 2004, the Respondent advised that, based on the information provided by ICTY - namely the Applicant's Personal History form, his curriculum vitae and the post description - "the appropriate level was P-4/VI upon initial appointment". The Tribunal is content that this review was objective and impartial, and that the Officers had before them the documentation necessary to complete their task.

Accordingly, notwithstanding the erroneous misstatements given by ICTY regarding the content of the Grading Standard, the Tribunal is satisfied that the Applicant was granted the correct step upon his entry into service and that any lingering doubts he may have - justifiably - harboured should now be laid to rest. Nonetheless, the misstatements as to the content of the Grading Standard clearly resulted in the Applicant honestly believing that he had not been treated fairly and that the step allocated to him on entry into service was too low, and this resulted in what for him must have been long, protracted and distressing proceedings. For this, he is entitled to compensation.

IV. The Applicant lodged his Appeal with the JAB on 7 July 1999. It took until 4 October 2000 for the Respondent to file his reply. The JAB Report was not issued until 17 January 2002 and it was not until January 2003 that the Applicant was told that the "review" recommended by the JAB had been carried out. These delays do little to inspire confidence in the Organization's system of administration of justice - or for the reputation of that system - but they are all too commonplace. Whilst the Tribunal deplores the repetitive delays and the pace at which the system moves, there is nothing unusual about such delays at all. Since the Tribunal has decided that the claims made by the Applicant that he be compensated in relation to his recruitment level should be rejected, it is difficult to justify an award of compensation for the delays he endured in relation to the progress of his case. This is particularly so as such delays are commonplace and do not usually attract any award of compensation, even where a case succeeds on its merits.

V. In view of the foregoing, the Tribunal:

1. Orders the Respondent to pay the Applicant compensation in the amount of US$ 5000 for the misrepresentations made as to the content of the Grading Standard; and,

2. Rejects all other pleas.

(*Signatures*)

Kevin **Haugh**
Vice-President, presiding

Omer Yousif **Bireedo**
Member

Spyridon **Flogaitis**
Member

New York, 24 November 2004

Maritza **Struyvenberg**
Executive Secretary